without anybody seeing him doing so. But where a Government officer has been entrusted with the keeping of Government revenue and it is discovered that the money entrusted to him is not to be found in the places in which he is authorised by the Government financial regulations or the departmental regulations to keep the money, this gives rise to an inference that he has misappropriated the money. Departmental regulations require revenue collectors to pay collections into the bank without delay and where it is not possible to pay late collections into the bank on the same day as the day on which they are received, the collectors are required to keep them locked in the departmental safe until the earliest time when it is possible to pay them into the bank. If the collections are not paid into the bank but kept in the departmental safe for some days or weeks, there is no breach of trust in respect of the collections because so long as they remain in the departmental safe they are still in the possession of the Government, although the responsible officer would be liable to serious departmental disciplinary action for the delay in paying into the bank. It is only when the money is removed from the safe or other authorised place otherwise than for the purpose of payment to the treasury or into the Government's account in the bank that it can be said that it has been taken out of the possession of the Government and there can be an inference that it has been misappropriated. The fact that only part of the collections for a particular day has been paid into the bank does not give rise to the inference that the balance has been misappropriated unless it is shown that the balance is not to be found in the safe and other authorised place.

It appears from the statement of the grounds of decision in the present case that the learned President found as a fact that the respondent kept revenue collections in the departmental safe of which he held the keys, but there is no evidence to show that the sums of money, the subject matter of the charges in this case, were missing from the safe. Probably there would not be difficulty for the prosecution to produce such evidence. According to the evidence in this case the accountant from Kuala Lumpur came to check the accounts some time in October, *i.e.* very soon after the dates of the alleged offences. I believe that normally when accountants or auditors carry out surprise check or routine inspection of accounts, one of the things they would do is to check the contents of the safe and record the amounts of money found in the safe and in the hands of the collectors. If the accountant in this case did so (there is reason to believe that he did so), by checking the amount which he found in the safe and in the hand of the collector against the amounts of collections recorded for the day of checking and the amount paid into the bank for that day, it can be found whether any sum was available in the safe to represent the short amounts in the account books. All that the prosecution would have to do in this case was to call the accountant to testify as to his finding as to the amount found in the safe, the amount paid into the bank, the amount recorded as collections and the amount in the hand of the collector, for the day of the checking.

I believe that in some Government departments books are kept in which records are made daily of the contents of the departmental safes, and at the end of each working day the cash to be kept in the safe for the night is counted by the head of the department or his deputy and he signs the entry in the record book to certify the amount of the cash kept in the safe at the end of each working day. If such a record book was kept at the respondent's office, it could have been produced by the prosecution to show the amounts kept in the safe on the dates stated in the charges.

In his statement of grounds of decision the learned President stated:

> "It might have been reasonable to infer from the set of facts elucidated there (i.e. the case of Johore Criminal Appeal No. 4/58 cited on behalf of the defence) that the money could be anywhere. On the facts of this case before the court now, I do not find it reasonable to make such inferences in view of the fact that the amount short paid equalled exactly the amount on the cheques."

From the mere fact that the amount short paid into the bank equalled exactly the amount on the cheque on each occasion I do not think it reasonable to infer that the short amount must have been taken possession of by the respondent, without evidence that the short amount was not to be found in other authorised places. Still there can be a possibility that the cheques were forgotten or inadvertently overlooked by the clerk (PW8) who made the entries of collections in exhibit P2A or by the respondent himself. On the other hand if there is evidence to show that the money representing the short amounts was not to be found in the safe, it would be reasonable to infer that the short amounts had been misappropriated by the officer entrusted with them and that the omission of the amounts of the cheques in the account book had been intentionally planned in order to hide the misappropriation.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Thevin, Chandran & Siva.*

JASBIR KAUR & ANOR. v. THARUMBER SINGH

[F.C. (Azmi L.P., Ong Hock Sim and Raja Azlan Shah F.JJ.) May 10, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 46 of 1973]

Land Law — Unregistered transfer of land — Transfer made for love and affection — Transfer subsequently cancelled — Registration of transfer effected by fraud or misrepresentation — National Land Code, ss. 215 & 340.

In this case the respondent, the registered proprietor of certain lands, had executed a transfer of the lands to the first appellant as trustee for one Jagvinder Kaur, the daughter of the appellants. The documents of title were deposited with a firm of solicitors. Subsequently, the respondent decided to cancel the transfer and obtained the documents of title back from the solicitors. Later the second appellant obtained the transfer from the solicitors and by falsely declaring that the documents of title were lost, he was able to register the transfer. The respondent thereupon brought an action to have the registration of the transfer and the documents of title issued cancelled. Judgment was given for the respondent and the appellants appealed.

Held: (1) the memorandum of transfer executed by the respondent had not, until its registration, effectually transferred the land to the first appellant;

(2) the learned trial judge was right in holding that there was fraud or misrepresentation on the part of the second appellant;

(3) it was sufficient for the purpose of section 340(2) of the National Land Code to support an allegation of fraud or fraudulent misrepresentation to prove that by means of fraud or misrepresentation the registration of the transfer was obtained and the first appellant was a party to the fraud or fraudulent misrepresentation.

Cases referred to:-

(1) *Venkat Subba Srinivas Hegde* v. *Subba Rama Hegde* A.I.R. 1928 P.C. 86; 52 Bom. 313.

(2) *T.V. Kalyanasundram Pillai* v. *Karuppa Mooppanar & Ors.* A.I.R. 1927 P.C. 42; 54 I.A. 59.

(3) *Macedo et al* v. *Beatrice Stroud* [1922] 2 A.C. 330 P.C.

FEDERAL COURT.

V. K. Palansuntharam for the appellants.

R. Chelliah (*V. Manuel* with him) for the respondent.

Azmi L.P. (read by **Raja Azlan Shah F.J.**): This action arose out of the registration of transfer of certain lands of which the plaintiff was the previous proprietor. The plaintiff alleged that the said lands were fraudulently transferred to the first defendant as the trustee for Jagvinder Kaur (f) an infant and gave the following particulars of fraud:

(a) On the 15th day of January, 1969, the second defendant obtained the Memorandum of Transfer and other Document executed on the 17th day of July, 1968, and which should have been cancelled, from Messrs. K.L. Devaser & Co., without the plaintiff's knowledge or consent.

(b) On the 29th day of January, 1969, the second defendant falsely and in furtherance of the fraud, made a false declaration that the Issue Documents of Title to the said lands were lost.

(c) The second defendant falsely stated that he had come to the knowledge that the Issue Documents of Title to the said lands were lost and that he had made an extensive search but to no avail.

(d) The second defendant further stated that he had not deposited the Issue Documents of Title with any person. The Issue Documents of Title were with the plaintiff. The first defendant and the second defendant were aware of this.

(e) The second defendant made the false declaration for the purpose of fraudulently procuring the transfer and registration of the said lands to the first defendant as the trustee for Jagvinder Kaur (f) an infant, and obtaining a new set of Title Deeds in the name of the first defendant.

(f) On the same day, without the plaintiff's knowledge or consent, the Memorandum of Transfer of the said lands to the first defendant as the trustee for Jagvinder Kaur (f) an infant which were executed on the 17th day of July, 1968, and which the plaintiff instructed Messrs. K.L. Devaser & Co. to cancel, were registered.

(g) On the 7th day of May, 1969, new documents of Title Nos. 18245, 18246 and 18247 were issued, though the plaintiff still had in his possession the Original Issue Document of Title Nos. 5597, 5598 and 5599.

(h) The first and second defendant had at all material times to this transaction knowledge that the plaintiff had changed his intention of making the gift of the said lands to Jagvinder Kaur (f) an infant and had cancelled the relevant documents and that the said first and second defendants acted in collusion in fraudulently procurring the transfer of the said lands to the name of the first defendant as trustee for Jagvinder Kaur (f) an infant.

The plaintiff therefore prayed for judgment for the following: —

(1) a declaration that the purported Power of Attorney executed on the 24th day of July 1968. and registered in the High Court, Kuala Lumpur, Registration No. 935/68 appointing the second defendant to be his attorney be declared null and void.

(2) a declaration that the Documents of Title issued on the 7th day of May 1969, Nos. 19245, 19246 and 19247 to the said lands be declared null and void.

(3) An order that the name of the first defendant as the trustee for Jagvinder Kaur (f) an infant be removed from the Registrar of Titles and the plaintiff's name be re-entered as the sole-proprietor of the said lands.

(4) an order that the Registrar of Titles cancel Title Nos. 18245, 18246, 18247 and re-enter Title Nos. 5597, 5598 and 5599 on the Register as Titles to the said lands.

(5) Damages.

(6) Costs of the suit.

(7) Such further and other relief as this Honourable Court may think fit.

The relevant facts of the case may be briefly stated as follows: — The plaintiff was married to Amarjit Kaur PW2. The first defendant is her sister. The first defendant and second defendant are man and wife. The infant Jagvinder Kaur is their child. Plaintiff adopted the child and intended to leave certain lands and houses, the subject matter of this litigation to the child. At first he made a will in favour of the child. The will was prepared by and signed in the presence of a solicitor Mr. Au-Yong Peng Choon on 10th July, 1968.

On 17th July 1968 plaintiff in the company of the defendants and the infant saw Mr. Devaser, plaintiff himself told him of his intention to transfer the said lands to the child. Plaintiff, however, in his evidence rather unexpectedly, having regard to his own pleadings and as it turned out, contrary to that of Mr. Devaser, stated that it was the first defendant who spoke to the solicitor and he had to agree because he was afraid of being beaten up.

Mr. Devaser prepared a document of transfer with the first defendant as the transferee and trustee for the child. Both plaintiff and first defendant signed the documents. The transfer was for love and affection. In other words it was a gift. Mr. Devaser sent the document to the stamp office to have it adjudicated and valued.

On 24th July 1968 plaintiff executed a power of attorney in favour of the second defendant.

On 21st August 1968 Mr. Devaser having got back the valuation from the stamp department wrote to the plaintiff requesting him to see him in his office.

On 29th August 1968 plaintiff went to see Mr. Devaser and told him that he wished to cancel the transfer. Mr. Devaser gave him back the titles of the land. Plaintiff did so at the urging of his wife, Amarjit Kaur (PW2). According to her she had the titles with her in India but she sent them to the second defendant at his second request. The second defendant told her that unless he got the titles to show to somebody the Government would take back the land. Some time after that she came back to Kuala Lumpur and a few days after her arrival Mr. Devaser's letter to plaintiff about the valuation of the lands was delivered at the house. She read the letter and was taken aback by the contents thereof. Her husband then explained to her as to what had happened during her absence in India with the result that she made him go to Mr. Devaser and get back the titles of the land.

She opened a savings bank account in the name of her husband, gave the book to the tenant with the request that the rent of the houses on the land be paid into this account. She then returned to India. The plaintiff followed her later together with the first defendant and her children. Whilst in India a fight arose between plaintiff's wife, her sister and brother-in-law. She accused her sister and her husband of cheating the plaintiff.

A few months later on 24th January 1969, second defendant went to see Mr. Devaser and told him that plaintiff had now decided to re-present the transfer and to get it stamped. Mr. Devaser pointed out to him that plaintiff had decided to cancel the transfer, but second defendant told him that plaintiff now agreed to have it stamped. Second defendant produced a power of attorney. Mr. Devaser pointed out that there was no power under that power of attorney to transfer the properties for love and affection. He therefore advised that a fresh transfer be made which could be executed in India by plaintiff before a magistrate. Mr. Devaser also said he declined to register the transfer when second defendant requested him to do so.

At the request of the second defendant Mr. Devaser handed over to him the memorandum of transfer previously signed by the plaintiff, and the valuation report of the lands.

On 15th February 1969 second defendant went to Mr. Devaser and obtained another copy of the trust declaration.

The plaintiff called the Deputy Registrar of Lands PW4 to give evidence. He stated that according to the documents in his possession as deputy registrar, the memorandum of transfer in reference to the said lands was presented on 21st September 1969 for registration. He produced the memorandum of transfer (P35). He himself did not know who presented the documents for registration. He identified three titles of lands P1 to P3. They were titles Nos: 18245, 18246 and 18247, issued in substitution of the original titles Nos. 5597, 5598 and 5599, which according to a statutory declaration affirmed by second defendant, to have been lost. On the strength of this statutory declaration rather than upon the power of attorney executed by the plaintiff in favour of Pritam Singh the new titles were issued.

The first defendant (DW2) in her evidence referred to the adoption ceremony of her child by the plaintiff and his wife. According to her the child remained with the adopted parents until they returned to India in 1965 or 1966. Her sister came back to Malaya in 1967 and after a few weeks went again to India. In reference to the incident at Mr. Devaser's office, she said that in answer to the question put to her by Mr. Devaser, she expressed her willingness to accept the transfer as trustee for the child. She gave evidence of the association of her sister with one Ajit Singh and a quarrel between the plaintiff and his wife over the titles of the land. Plaintiff demanded the return of the titles from his wife; her sister denied having them. When the plaintiff and her sister went to India in 1966 they gave back the child to her because, according to her, they did not know whether they could get a proper place to live in Bombay. She denied that she and her husband persuaded the plaintiff to transfer the property to her daughter. In answer to Mr. Chelliah she said: —

"The plaintiff asked Mr. Devaser to finish the job as soon as possible. I did not give any instruction to Mr. Devaser, all instructions to Mr. Devaser were given by the plaintiff. My husband did not give any instruction to Mr. Devaser."

She also said in her evidence that plaintiff handed over the titles of the land to her and her husband. The titles were with her and were lost. She denied personal knowledge of plaintiff's instructions to his solicitor to cancel the memorandum of transfer but expressed disbelief that the plaintiff had done so. In answer to the court she said that the plaintiff obtained the titles of the land from Mr. Devaser and he handed them to her and her husband. Her husband kept them in the almeirah.

According to second defendant (DW4) he was present during the consultation at Mr. Devaser's office and was witness to the execution of the instrument of transfer by both the plaintiff and his wife and also his wife's execution of the declaration of trust. In reference to the letter from Mr. Devaser to the plaintiff informing the latter of the receipt of the valuation of the land, second defendant said that plaintiff handed over the letter to him and denied that it was Amarjit Kaur who received it. He corroborated his wife's evidence that plaintiff after returning from Mr. Devaser's office handed over to him the titles of the land for safe-keeping. The titles were lost. He referred to his interview with Mr. Devaser who told him of plaintiff's decision to cancel the transfer. Mr. Devaser declined to proceed with the registration but said that he (second defendant) could do so. He subsequently had the transfer registered. In cross examination he explained that he did so because the plaintiff and his wife authorised him to get the transfer registered.

The learned judge made several relevant findings of facts. He concluded that when plaintiff executed the memorandum of transfer he had the necessary intention to transfer the lands to the child. Notwithstanding plaintiff's evidence to the contrary the learned judge expressed the view that plaintiff had the necessary intention to execute and did execute the power of attorney knowingly in favour of the second defendant, for the simple reason that at that time plaintiff was leaving for India and was eager to get the transfer registered before he left. He also expressed the view that in the circumstances of this particular case on the balance of probabilities Mr. Devaser's letter regarding the receipt of the valuation from the stamp department was in fact received by Amarjit Kaur and that whatever might have caused plaintiff to change his mind, he had by then no further intention to proceed with the transfer. The learned judge indicated that his conclusion is arrived by the evidence of Mr. Devaser and the fact that plaintiff's post office savings bank account book was handed to a tenant of the house on the land in question with direction that she collect the rents of the houses and to deposit them into this account. This evidence was corroborated by the tenant herself. The learned judge also expressed that he firmly believed that the defendants had made

up the story of the receipt of the letter to Amarjit Kaur from her lover Ajit Singh which roused the anger of the plaintiff, with the result that he instructed second defendant to look for the land titles. The learned judge formed the conclusion that about the beginning of September 1968, the defendants had full knowledge of plaintiff's instructions to Mr. Devaser to cancel the transfer and thus had no further intention to proceed with it and that also the defendants' knowledge that the titles of the land were with Amarjit Kaur. The learned judge also rejected the defendants' allegation that the plaintiff had given verbal instructions to them to proceed with the transfer before returning from India.

The learned judge then referred to the registration of the transfer which was supported by the power of attorney and the transfer executed by the plaintiff, together with second defendant's statutory declaration of the loss of the titles, and finally concluded in these words:

"After careful consideration I find that when second defendant proceeded with the registration of the transfer he did so deliberately regardless of the cancellation and in so doing, falsely represented that he had the consent of the plaintiff. It was with the object of furthering the deception that the second defendant falsely made a statement to the effect that the issue documents of title were lost whereas he knew full well that they were in Amarjit Kaur's possession."

The learned judge also, towards the end of his judgment said that the first defendant was a party to the whole scheme.

In coming to the various conclusions of facts it was apparent that the learned trial judge made certain findings of primary facts based on the credibility of the witnesses, and where it was necessary to make findings based on inferences of facts he had carefully set out the relevant circumstances. Mr. Palasuntharam's points of argument on behalf of the defendants in this court as in the court below, in my view may be stated in the following paragraphs: —

(i) The plaintiff executed the document of transfer of the said lands in favour of the first defendant as trustee for the infant. This is not disputed. In fact I had already referred to the finding by the learned trial judge on this point. He decided that the plaintiff at the time of executing the document had the intention to transfer the land as stated.

(ii) The plaintiff left the document of transfer and the titles of the lands with the solicitor Mr. Devaser. Mr. Palasuntharam argued that from this moment Mr. Devaser had the possession of these documents in the capacity of the solicitor for the first defendant. The document of transfer and titles had therefore been delivered to the first defendant.

(iii) Previous to that the first defendant had signed the declaration of trust that she would hold the said lands in trust for the child and that she would transfer and convey the said lands to the said child as soon as the child came of age without consideration whatsoever for the use and benefit of the child absolutely.

(iv) The plaintiff has done all that was necessary to be done as a transferor.

In support of the above contentions Mr. Palasuntharam cited firstly two Privy Council judgments *i.e. Venkat Subba Srinivas Hegde* v. *Subba Rama Hegde*[1] and *T. V. Kalyanasundaram Pillai* v. *Karuppa Mooppanar & Ors.*[2]

In the *Pillai*' case decided in 1926, the headnote of the report reads as follows: —

"A Hindu executed a deed of gift of part of his immovable property and delivered it to the donee. On the following day he adopted a son. Three days later he registered the deed: —

Held, that the gift was valid against the adopted son. On delivery of the deed to the donee there was an acceptance of the transfer within section 122 of the Transfer of Property Act, 1882, and thereupon the gift became effectual, subject to its registration as required by section 123."

In the judgment delivered by Lord Salvesen, section 122 and section 123 of the Transfer of Property Act of India were cited and the sections read as follows: —

"section 122. Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void."

Section 123 is in these terms:

"For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

Section 47 of the Indian Registration Act of 1877 was also cited in the judgment and the section reads as follows: —

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

At page 44 Lord Salvesen construed the sections of the Acts in these words: —

"(Their Lordships) are unable to see how the provision of section 123 of the Transfer of Property Act can be reconciled with section 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with."

In the later case of *Hegde* the Privy Council held:

"Once a gift-deed is executed and has been delivered to the donee, the donor cannot revoke the gift even before its registration on the ground that the gift is not completed until the deed is registered."

Mr. Palasuntharam also cited the Privy Council case of *Macedo et al* v. *Beatrice Stroud.*[3] In this case the owner of mortgaged lands and houses in Trinidad, about three months before his death, executed a conveyance and a memorandum of transfer by each of which he purported to convey or transfer certain properties absolutely to his daughter in consideration of his affection for her. The properties dealt with by the memorandum of transfer were registered under the Real Property Ordinance No. 60 of Trinidad and accordingly by section 46, no transfer of them was effectual to pass any estate or interest unless the instrument was registered under the Ordinance.

Section 46 reads as follows: —

"46. No instrument until registered in manner hereinbefore prescribed shall be effectual to pass any estate or interest in any land under the provisions of this ordinance."

The donor after having executed the two instruments delivered them to his solicitor telling him to keep, and not to register them. They remained in the solicitor's custody unregistered until the death of the donor, who during his lifetime continued to receive the rents. There were concurrent findings that the instruments were intended to operate as immediate and unconditional gifts to the daughter. Viscount Haldane delivering the advice of the Privy Council in that case said at page 334: —

"Most of the property was governed, as regarded the mode of conveyance, by the general law under which freehold and leasehold property is assured in Trinidad by deed, like land in England, although in Trinidad such deeds require only signature and delivery but not sealing. Registration under the local ordinance is not required in the case of such property so far as concerns the validity of the deed, although non-registration may postpone title to that conferred by a registered assurance. But certain parts of the property.... were held upon titles registered under the local Real Property Ordinance No. 60, and amending ordinances. These ordinances provide as to land subject to them that no transfer is to be effectual to pass any estate or interest in land with a registered title, unless the transfer is registered in accordance with the ordinances, and the title of the registered proprietor as appearing on the register is conclusive."

It was held in that case: —

(1) "that the deed of conveyance, though not delivered to the daughter, operated to convey to her the properties to which it referred;

(2) the memorandum of transfer not having been registered under the ordinance, nor delivered to the donee for that purpose there was an imperfect gift of the properties with which it dealt with to which equity could not give effect."

It was obvious from the above cases that the law in India as in England in respect of a gift of land, the gift is complete and becomes thereby irrevocable once the deed of transfer executed by the donor is delivered to the donee or "any person having the necessary interest within the prescribed period." On the other hand in Trinidad they had, at least in 1922, both the mode of conveyance by deed, like land in England and also by registration under the Real Property Ordinance. It was pointed out by Mr. Chelliah for the plaintiff that in the instant case the argument put forward on behalf of the defendant would fail on the ground that the document of transfer had not been delivered to the first defendant. He maintained that Mr. Devaser continued to be the solicitor of the plaintiff and had never at any stage of the proceedings become the solicitor for the first defendant.

The learned judge rejected the submission that the plaintiff and the first defendant jointly gave instructions to Mr. Devaser, but held that there was never a solicitor and client relationship existing between Mr. Devaser and the first defendant. I see no reason why we should interfere with that finding made by the learned trial judge. He was also unable to find any solicitor and client relationship existing between Mr. Devaser and second defendant. It would therefore follow that based on this finding it is not possible to accept the submission that there was delivery of the document of transfer to the first defendant.

Notwithstanding all that it is my view that the question of law to be decided should be one based on the Torrens system. Under that system as has been held in the courts in Australia and New Zealand it is the official act of registration and not the execution and delivery of the dealing or instrument, which creates or assigns the estate. This view is supported by the provisions in our National Land Code in section 215 which reads as follows: —

"Form, and effect generally, of transfer of land.

(1) The transfer under this Act of any alienated land shall be effected by an instrument in Form 14A.

(2) The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.

(3) The transferee of any alienated land shall hold the same subject to —

(a) any lease, charge or other registered interest subsisting in respect thereof at the time the transfer is registered;

(b) subject to sub-section (3) of section 213, any tenancy exempt from registration granted by the transferor or any predecessor in title;

(c) all conditions and restrictions in interest then applicable thereto; and

(d) all other matters then appearing on, or referred to in, the register document of title."

The transfer executed by the plaintiff in this case is in the form of Form 14A.

The learned author (E. A. Francis) of Torrens Title in Australasia Vol. 1 at page 7 explains the Torrens system in these words: —

"Under the Torrens system, the register is primarily a register of titles. At the time land is brought under the system, the identity of the parcel is established and the nature of the title to it (whether freehold or leasehold), and the identity of the person or persons in which that title is vested, are ascertained. The issue of the certificate of title, and its inclusion in the register, set upon these matters the imprimatur of the State. The certificate records the exceptions, reservations and encumbrances to which the registered estate is subject. All subsequent dealings with the land, and the creation of easements affecting it, and of any further charges or encumbrances, are affected by the registration of dealings or instruments in a prescribed form. The execution of such dealings or instruments is not without effect, as will subsequently be noted, but it is the official act of registration which transfers or creates the estate or interest in the land. As was observed by Griffith C.J. in relation to the Victorian Transfer of Land Act 1890, in *Perpetual Executors and Trustee Association of Australia Ltd.* v. *Hosken* ((1912) 14 C.L.R. 286 at p. 289). 'The substance of the scheme of the Transfer of Land Act was to substitute conveyance by registration for conveyance by deed'."

In my view, therefore, the memorandum of transfer executed by the plaintiff before its registration had not effectually transferred the land to the first defendant.

The learned judge's finding as to fraud was also attacked. Firstly, it was argued that the learned judge had not referred to the standard of proof required to support an allegation of fraud when he had not borne in mind the high standard of proof so required. Mr. Chelliah argued that the learned judge did have in mind the necessary standard of proof in cases of fraud by the use of words he employed when dealing with the questions of facts. For example he used the words

"firmly believe", again "I have formed the irresistible conclusion" and also his use of the words "In the circumstances I believe fraud has been clearly established." The evidence in reference to this allegation of fraud in this case was based in my view on credibility of witnesses and also circumstantial evidence. The learned judge rejected the evidence of the defendants and substantially he did so on the credibility of these witnesses. I do not think we should interfere with such a finding. In my view having regard to the evidence of these two witnesses as found by the learned judge and also the circumstances of the case, the learned judge was right in concluding that fraud had been clearly established.

Mr. Palasuntharam further submitted that the first defendant's title to the said land is now indefeasible in view of section 340 of the National Land Code. He went on further to say that if there had been fraud or fraudulent misrepresentation on the part of the defendants it was fraud or fraudulent misrepresentation which induced the Registrar of Titles to act and not a fraud or fraudulent misrepresentation which induced the plaintiff to act, and also that the first defendant as trustee had a legal duty and a legal right to have the transfer to her as trustee registered, and to get into her keeping, documents and titles to the said lands. For that reason he submitted that her title is indefeasible and that the defendants acted correctly.

Section 340 provides as follows: —

"340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party of privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

... ... "

I regret I am unable to accept counsel's arguments. The learned judge found as a fact that the second defendant knew that the plaintiff had cancelled the transfer. This is corroborated by Mr. Devaser's evidence. Therefore, second defendant had no further authority to proceed with the registration. Notwithstanding all that he secured the memorandum from Mr. Devaser and falsely represented that he had authority to proceed with the registration when in fact he knew he had no such authority. Having obtained the memorandum he proceeded to make a declaration falsely that the grants were lost and in fact falsely represented that the plaintiff had agreed to the registration when in fact second defendant knew that it was not true. On those findings the learned judge was right in holding that there was ample evidence to establish fraud or misrepresentation within the requirements of section 340(2) of the National Land Code.

In my view it would be sufficient for the purpose of section 340(2) to support an allegation of fraud or fraudulent misrepresentation to prove that by means of fraud or misrepresentation the registration of the transfer was obtained and that the first defendant was a party or privy to the fraud or fraudulent misrepresentation.

In my view therefore the appeal should be dismissed with costs. The deposit of the appellants should be paid towards the taxed cost of the respondent.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; V. Manuel & Co.*

TAN TAI HEE v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Azmi J.) May 10, 1974]
[Kuala Lumpur — Criminal Appeal No. 228 of 1973]

Dangerous Drugs — Possession of opium smoking utensils — Possession of opium — Drug addict or pushers — Assessment of sentence — Dangerous Drugs Ordinance, 1952, ss. 9(1)(b) and 10.

The appellant aged 37 had pleaded guilty to two charges under the Dangerous Drugs Ordinance 1952. The first charge was under section 10 of the Ordinance for being in possession of two smoking pipes and other opium utensils. The second charge was under section 9(1)(b) for being in possession of ten ounces of prepared opium and eleven ounces of opium dross. He had one previous record for similar offences and the learned President sentenced him to six months imprisonment on each of the two charges — the sentences to run concurrently. The appellant was dissatisfied with the said order on the grounds, *inter alia*, that he was now undergoing treatment at the General Hospital Kuala Lumpur and that the learned President erred in law in not seeking medical evidence before imposing the sentence of imprisonment.

Held: (1) in assessing sentence involving drugs, a distinction should be made between possession of such drugs by addicts and possession by pushers or carriers;

(2) under the circumstances, and having regard to the small quantity of chandu involved, the sentence imposed was manifestly excessive as it served no useful purpose and a sentence of fine would be imposed instead.

CRIMINAL APPEAL.

W. M. Lai (Miss) for the appellant.

T. S. Sambanthanmoorthy (Deputy Public Prosecutor) for respondent.

Mohamed Azmi J. (delivering oral judgment): On November 24, 1973 the appellant aged 37 years old pleaded guilty in the Sessions Court at Petaling Jaya on two charges under the Dangerous Drugs Ordinance No. 30/52. The first charge was under section 10 of the Ordinance for being in possession of two smoking pipes and other opium smoking utensils. The second charge was under section 9(1)(b) for being in possession of ten ounces of prepared opium and eleven ounces of opium dross. He had one previous record for similar offences and the learned President sentenced him to six months imprisonment on each of the two charges — the sentences to run concurrently. The appellant is dissatisfied with the said order on the